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IN THE

Supreme Court of the United States

October Term, 1933.

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA,
Petitioner and Appellee below

vs.

ULUETTA PRINSEN,
Respondent and Appellant below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Travelers Protective Association of America, respectfully represents to this court:

By express provision in its articles of incorporation and by-laws the fraternal benefit association here involved not only did not agree to pay benefits, but expressly refused to insure, where death resulted while a member was "participating * * * in the moving or transportation of gunpowder, dynamite, or other explosive substance". (R. 25)

When killed, James Prinsen, the member whose death is the subject of this suit, was admittedly riding on a truck carrying a load of 300,000 dynamite caps which exploded when the automobile came into collision with a train at a railroad crossing.

The Tintic Powder & Supply Company had ordered 300,000 dynamite caps from the Hercules Powder Company, stating that Mr. Begaman, its truck driver, would be in for

those caps within the next day or so. (R. 31) The Hercules Powder Company telephoned that order to its agent, the Western Powder Company, where it was "received and written up by Mr. Prinsen". (R. 31) Thereafter, within a day or so, Begaman came with his truck to get the dynamite caps and with Prinsen drove out to the magazine where the powder was kept, north of Salt Lake City, just over the line in Davis County (R. 31); *"that Mr. Prinsen took the key to the powder magazine to effect the delivery of these caps;* that after he effected the delivery of the caps he got upon the automobile of Mr. Begaman in which the dynamite caps had been loaded and rode from the magazine to the place of the collision with the Denver & Rio Grande train, which was at a point called the Cudahy crossing just north of Salt Lake". (R. 31)

At the trial all the foregoing facts were by counsel for the parties stipulated in evidence (R. 30)—hence, as stated by trial Judge Johnson in the opinion he delivered when he directed a verdict in favor of the defendant, "none of them" (the facts) "being in dispute" (R. 59) there is really no conflict in the evidence on any material point in the case.

Looking to the proofs of death furnished by the beneficiary—which are binding on the assured—Mutual Life Ins. Co. v. Newton, 22 Wall. 32; 89 U. S. 32; 22 L. ed. 793-5; Hassencamp v. Mut. Ben. L. Ins. Co., 120 Fed. 475—(referred to as Exhibit "B", and called Statement of the Beneficiary and Proof and Notice of Loss—R. 17) we find it containing (Defendant's Exhibit 1) the Attending Physician's Statement (R. 20) in which in answer to the question: "14. What was the precise nature of the injury and its extent?" the following is stated to be the fact: *"Collision between train and truckload of dynamite caps".* (R. 21) Again the following questions and answers are found in the statement of the attending physician furnished by the plaintiff to the defendant Association: "20. What *cause,* in your opinion, *operated* to produce death or contributed thereto? *Blown to pieces.* 21. If an autopsy or post-mortem examination of the body was made, state result? None, as body was mutilated beyond examination."

Plaintiff also furnished, as a part of her proofs of death, on a blank furnished by the Association, an Affidavit of an Eye-Witness (Defendant's Exhibit 2, R. 22) from the fireman on the train which collided with the truckload of dyna-

mite on which Mr. Prinsen was riding, supplying the following facts:

> "At time of accident *which resulted in death of James Prinsen* and two other men, I was acting as fireman on the D. & R. G. W. R. R. passenger locomotive involved in the accident, on train No. 3 going north from Salt Lake City. My recollection of the event is that as the train neared the Cudahy Packing crossing at North Salt Lake, I saw a truck approaching from the west and supposed same would stop before getting on track. *Almost immediately a collision and explosion occurred* which resulted in the death of engineer at my side and myself becoming unconscious."

On these facts Judge Tillman D. Johnson, District Judge for Utah, directed a verdict for defendant (R. 53-59). The Circuit Court of Appeals for the Tenth Circuit, by a divided court, reversed the judgment (R. 73) and thereafter denied a rehearing (R. 75).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. The correct interpretation and proper construction of an exemption clause which is shown by the decided cases to be in common and general use in accident insurance policies and benefit certificates of fraternal societies, and on which the Tenth Circuit Court of Appeals is in apparent disagreement with other courts, is a matter of such public interest and concern as to deserve final settlement by this court.

II. By the majority opinion in this case the Tenth Circuit Court of Appeals has rendered a decision which is in conflict with a prior decision of that court, and which is also in conflict with a decision of another circuit court of appeals on the same question, and has decided that question in such a way as to bring its decision herein in conflict with the decisions of such of the state courts as have passed on the question.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full

and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled on its docket, No. 752, Ulnetta Prinsen, appellant, vs. The Travelers Protective Association of America, appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Tenth Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated this 28th day of August, A. D. 1933.

EMMETT M. BAGLEY,
PAUL H. RAY,
Attorneys for Petitioner.

ROBERT L. JUDD,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinions of Court Below

The prevailing and dissenting opinions of the Circuit Court of Appeals, dated June 22, 1932, will be found R. 67, 72 and are reported in 65 F. (2d) .....

II.

Jurisdiction

1. The date of the judgment to be reviewed is June 22, 1933, (R. 73), petition for rehearing denied July 27, 1933 (R. 75).

2. The majority opinion in this case, reversing the District Court, is in conflict with the decision of the Fifth Circuit Court of Appeals in *Pittman v. Lamar Life Insurance Co., 17 F. (2d) 370,* in which certiorari was denied by this court, 274 U. S. 750; 71 L. ed. 1331,

3. The majority opinion herein is in conflict with a prior decision of the same court in *Head v. New York Life Ins. Co., 43 F. (2d) 517,* which followed the *Pittman Case, supra.*

4. The interpretation placed in this case on a commonly used clause in fraternal benefit insurance contracts, if allowed to stand, will be in conflict with the decisions of state courts construing the same clause:

Bew v. Travelers Ins. Co., (N. J.) 95 N. J. 533, 112 Atl. 859;
Travelers Ins. Co. v. Peake, (Fla.) 82 Fla. 128, 89 So. 418;
Meredith v. Business Men's Acc. Assn., (Mo.) 213 Mo. App. 688, 252 S. W. 976.

5. The public interest will be promoted by the prompt and final settlement by this court of the question here presented.

III.

Statement of Case

This has already been stated in the preceding petition for certiorari.

IV.

Specification of Errors

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in refusing to hold and decide as matter of law that James Prinsen was at the time of his death *participating in the moving or transportation of explosives* contrary to the provisions of the benefit certificate involved in this case.

3. The majority opinion in this case fails to recognize and apply the now well settled legal distinction between the terms "engaged in" and "participating in" as those terms are used in accident policies and as they have heretofore been uniformly interpreted by other federal and state courts.

4. There is no ambiguity about the meaning of the word participate. It has a well settled meaning—hence this case presents a question of law for the courts, as held in the dissenting opinion, and not a question of fact for a jury to juggle with, as held in the majority opinion.

V.

ARGUMENT

At the conclusion of the trial District Judge Johnson held in granting defendant's motion for a directed verdict:

> "They were not there by chance, it appears. By prearrangement between the parties referred to in the stipulation the insured, who was employed by a powder company, went out to the powder magazine beyond the railroad track and westerly from the Cudahy Packing Plant for the purpose of getting these dynamite caps in a truck. He had the key to the magazine. • • •

> "Now, he went out there for the purpose of making delivery to the truck driver for the purchaser of the dynamite caps, as I understand the record. What happened at the magazine we don't know. We do know that they went for the purpose of loading these caps into the truck and hauling them away. Whether he assisted in loading, of course, is unknown. And as nothing occurred in that part of the business, it is not of great importance. Having loaded the truck, the driver and the insured got into it and were returning, I presume over the same route that they had used in going to the magazine." (R. 55)

> "But from the time they began to move the dynamite out of the magazine and into the car there was a moving, and in a limited sense a transportation of dynamite caps. If this language in the constitution is to be construed in a very narrow sense, then it would be limited to any act on his part with respect to the moving or transportation of the dynamite caps. But if it is to be construed in the sense that it means having entered upon this business of delivering to the purchaser of the caps bargained for, the order filled, and he went out with the driver of the truck to make delivery, then he became a participant from the time the operation of it began;" (R. 56)

In the majority opinion written by Judge Lewis and concurred in by Judge Phillips the Circuit Court of Appeals held:

> "Participation in the moving or transportation of a thing requires action, effort or direction. It is not an unreasonable inference that the sole purpose of Prinsen in getting on the truck with Begaman was to ride back to Salt Lake City, that he took no part in the operation of the truck, nor gave directions in that respect, nor made suggestions as to its speed, nor in any manner took part with Begaman in its operation."

Judge McDermott in a dissenting opinion, after referring to the prior holding of the court in *Head v. New York Life Ins. Co.*, (C. C. A. 10) 43 F. (2d) 517, said:

> " • • • it seems to me that one riding on a truckload of dynamite caps is 'participating in the moving or transporting thereof.'
>
> "There is another reason, to me more impressive. In construing insurance contracts the same search should be made to ascertain the intent of the parties as in other contracts, and the language used ought to be taken in its 'plain, ordinary and popular sense.' Chase v. Business Men's Assur. Co., (C. C. A. 10) 51 F. (2d) 34. The purpose of a clause may also be looked to if the words used are not clear. Both the language and the purpose of this clause seem clear to me. There is a hazard attendant upon the transportation of explosives—a hazard which the deceased shared equally with the driver on the seat beside him. The parties intended to, and I think did, agree that such hazard was not a risk insured against.
>
> "In any event, I see nothing to go to the jury. The facts are not in dispute; in fact, they were largely stipulated. Whether such facts disclose that deceased was participating in the transportation of explosives depends upon the meaning of the word 'participating', as used in this written contract, which is a question for the court and not the jury. Since I think the deceased was so participating when he met his death, I think the judgment below should be affirmed."

Petitioner respectfully submits and urges that the construction placed by Judge Lewis on the clause involved in the certificate would have been a correct definition if the term "engaged in" had been used in the certificate in this case, as it does occur in many accident policies which have been construed by the courts; but the test applied by Judge Lewis, which fits the "engaged in" provision, is nowhere applied in any other decided case where, as here, the exemption from liability specifically excludes cases occurring while the insured is "*participating in*" specified dangerous undertakings. The two types of policies are entirely different and distinct. As we conceive it the majority opinion overlooks that distinction. Judge McDermott, relying on the decision of the same court in the *Head case, supra,* asserts that "the word '*participate*' was there distinguished from the word 'engage' and *was held to mean* 'to take or have a part or share in.' "

The adjudicated cases which deal with provisions in accident insurance policies excluding risks where the insured is "engaged in" specified activities or occupations, and with which the majority opinion has confused the present case, are:

Gits v. N. Y. L. Ins. Co., (7th C. C. A.)
32 F. (2d) 7;
Sov. Camp W. W. v. Compton, (Ark.)
215 S. W. 672;
Masonic Acc. I. Co. v. Jackson, (Ind.)
147 N. E. 156;
Masonic Acc. I. Co. v. Jackson, (Ind.)
164 N. E. 628;
Ben. Assn. Ry. Emp. v. Hayden, (Ark.)
299 S. W. 995;
Peters v. Prudential Ins. Co.,
233 N. Y. S. 500.

In the following cases the provisions involved excluded liability where, as in this case, the assured was at the time "participating in" certain dangerous risks or hazardous undertakings:

Head v. New York Life, (10th C. C. A.)
43 F. (2d) 517;
Head v. Hartford Acc., (10th C. C. A.)
43 F. (2d) 517;
Pittman v. Lamar L. Ins. Co., (5th C. C. A.)
17 F. (2d) 370;
Bew v. Travelers Ins. Co., (N. J.)
112 Atl. 859;
Travelers Ins. v. Peake, (Fla.)
89 So. 418;
Meredith v. Business Ben's Acc. Assn.,
252 S. W. 976.

In the foregoing cases is pointed out the distinction between policies excluding injuries sustained while "engaged in" aviation and policies exempting risks encountered in "participating in" aviation.

The first class of cases proceeds upon the theory that to be "engaged" in aviation imports something more than a mere single or occasional participation. As held in the *Peters*

Case (233 N. Y. S. 500) supra; "the expression '*engaged* in aviation' should not include a passenger taking an occasional ride in an airplane. If it was so intended, the language is inept and ambiguous and should not be construed against the insured. If it was intended to except occasional rides in an airplane by a passenger, the author of the language should have employed some other expression, *such as 'participating in'.*"

The other type of exemption clause, like the one involved in this case, does not merely prohibit the insured from engaging in the forbidden activity as a business or occupation but does prohibit him from even once, as a passenger or otherwise, exposing himself to the risk of injury from a banned hazard. And, as held by the court in the *Head Case, (43 F. (2d) 517), supra,* there need be no suggestion of the insured contributing effort, it being sufficient to hold as a matter of law that he is *participating* when it is made to appear that the insured was riding with the driver although the pilot alone operated and navigated the plane.

Nowhere has the distinction between the two types of policy provisions "engaged in" and "participating in" been more clearly pointed out than by the lower court in the *Head Case, (43 F. (2d) 517) supra,* in an opinion written by Judge Phillips concurred in by Judge Lewis and Judge McDermott, as follows:

> " 'Engage', is defined in volume 3 of Words and Phrases, Third Series, at page 258, as follows: ' "Engage" means to take part in or be employed in, however the employment may arise;' and at page 259 as follows: 'To "engage" is to embark in a business; to take a part; to employ or involve one's self; *to devote attention and effort'.* The word 'engage' connotes more than a single act or a single transaction; it involves some continuity of action. Guiltinan v. Metropolitan I. Co., 69 Vt. 469, 38 A. 315, 316; Peters v. Prudential I. Co., 133 Misc. Rep. 780, 233 N. Y. S. 500, 501. In the latter case; it was held that the phrase, '*engaged in aviation,*' did not include a passenger taking an occasional ride in an airplane and suggested that if it were intended to include such a passenger it should have employed the expression '*partici-*

pating in'; and pointed out that the word 'engaging' means something more than an occasional participation.

"On the other hand, the word '*participate*' means simply '*to take or have a part or share in,*' and 'participating' means 'a taking part, as in some action or attempt.' New Century Dictionary.

"In Bew v. Travelers' Ins. Co., 95 N. J. Law, 533, 112 A. 859, 860, 14 A. L. R. 983, the court said:

> 'The Standard Dictionary and a number of other dictionaries consulted, define "participate" as meaning "to receive or have a part or share of; to partake of; experience in common with others; *to have or enjoy a part or share in common with others;* partake; as to participate in a discussion." "To take a part in; as to participate in joys or sorrows." '

"One who takes a part in a single action participates therein. The word applies equally to a single act or to many acts.

"This distinction between the phrase 'engage in aviation' and the phrase 'participating in aeronautics' is clearly pointed out in Price v. Prudential Ins. Co., (Fla.) 124 So. 817. *Because of this difference in the meaning of such words, the cases relied upon by counsel for plaintiffs are not in point.*

* * *

"In Meredith v. Business Men's Accident Ass'n of America, 213 Mo. 688, 252 S. W. 976, 978, the court defined 'participating in aeronautics' to mean '*to share* in sailing or floating in the air.'

"Bew v. Travelers' I. Co., supra; Meredith v. Business Men's Ass'n, supra, and Travelers' I. Co. v. Peake, 82 Fla. 128, 89 So. 418, dealt with clauses in insurance policies similar to the clause in the instant case *and in each of the above cases it was held that a passenger in an airplane flying the air, was participating in aeronautics.* See, also, Pitt-

man v, Lamar L. I. Co., (C. C. A. 5th) 17 F. (2d) 370.

> "We think there can be no doubt that a person who rides in an airplane, along with the pilot who operates and navigates the airplane, has a part or share with such pilot in flying in the air and is participating in aeronautics."

In the light of the foregoing *prior* decision of the lower court we respectfully submit that the holding in that case is in direct conflict with the holding in the majority opinion in this case. The two holdings cannot be reconciled.

If the lower court was correct in first saying in the *Head Case (43 F. (2d) 517) supra:* "We think there can be no doubt that a person *who rides* in an airplane, along *with the pilot who operates and navigates the airplane,* has a part or share with such pilot in flying in the air and *is participating in aeronautics",* then Judge Lewis is certainly wrong in the instant case in basing the opinion on the proposition there stated that "Participation in the moving or transportation of a thing *requires action, effort or* direction"; and clearly the majority opinion, as written, ignores the now established and well recognized distinction between a clause exempting liability where one is engaged in a certain activity or occupation and those clauses which exclude liability where one is merely participating in a specified hazardous undertaking.

It is not the mere *act* of participating in the movement or transportation of explosives against which the exemption clause here involved is directed. It is the obvious danger and hazard of going into close proximity to such a highly dangerous agency, particularly when it is being handled or moved —when and whereby the danger of explosion is greatly increased—that the Association in this case declined to insure against. Prinsen's presence on the moving truck which was transporting the load of dynamite caps made him a participant in its movement and brought him for the time within the very inhibition of the policy against exposing himself to risk of injury from that source. And when we recall that it is admitted in the record now before this court that Prinsen was on the truck at the scene of the accident in the course of his employment, and that the sole purpose of his trip to and from the powder magazine had to do only with the dynamite caps

his employer was furnishing through him to its customer, it is clear that Prinsen intentionally and deliberately came into and remained in close proximity to the dynamite caps while they were being transported from the powder magazine to the point of the accident, and had participated and was participating in the transaction involving the movement of the dynamite caps from its beginning until its fatal ending.

The whole basis for and theory of the majority opinion in this case is that Prinsen was not "participating" in the movement or transportation of the dynamite caps because he was merely *riding on* the auto truck which was loaded with the dynamite caps and was not taking an active part in the driving or operation of the truck. That is shown by the foregoing quotation from the majority opinion.

That the majority opinion does not correctly express the true meaning of the term *participate* can, we respectfully submit, be demonstrated by a reading of the decided cases construing that word.

In the *Head Cases, (43 F. (2d) 517) supra,* one of the policies excluded liability where the insured was injured "while *participating* in or in consequence of *participating* in aeronautics" (p. 521) and Judge Phillips points out in the opinion that Head took no part in the operation of the airplane, exercised no direction over it—just as Judge Lewis says Prinsen did not do—and states that Head merely went to the airport to get information concerning an airplane preparatory to writing a policy insuring it against fire, theft and tornado; "that the pilot of such airplane suggested that insured *'take a ride'* in the airplane for the purpose of gathering such information as might be needed in preparing the application for and writing such insurance; that the insured boarded such airplane *and the pilot set it in motion;"* and in about six minutes it crashed to the ground and was wrecked, killing Head.

There was, we respectfully submit, just as much "participation" by Head in the airplane ride as there was by Prinsen in the ride on the truck load of dynamite caps. It may properly be asked, we think, what "action, effort, or direction" Head exercised in or over the operation of the airplane, that justified the lower court in that case holding as *matter of law* that Head was debarred from recovering be-

cause he was *participating* while merely riding in the airplane, that can be pointed to to support a distinction between what Prinsen did or did not do while riding on the truck load of dynamite caps? In the majority opinion in our Prinsen case it is stated "that he took no part in the operation of the truck, nor gave directions in that respect, nor made suggestions as to its speed, nor in any manner took part with Begaman in its operation". In answer to this attempted distinction we call the court's attention to the fact that Head took no part in the operation of the airplane, and gave no directions in that respect, and made no suggestions as to its speed, nor in any manner took part with the pilot who alone "set it in motion" and operated it until it fell. Is it really a matter of any concern in this case that, as the court points out, it may be inferred "the sole purpose of Prinsen in getting on the truck with Begaman was to *ride back* to Salt Lake City"? That was all Head was doing. He entered the airplane because the pilot "suggested that insured *take a ride*" therein, and the court winds up its opinion in that case by saying: "We think there can be *no doubt* that a person *who rides* in an airplane, along with the pilot who operates and navigates the airplane, *has a part or share with such pilot in flying in the air* and *is participating* in aeronautics".

The only other federal court case coming to our attention is that from the Fifth Circuit Court of Appeals (1927) of *Pittman v. LaMar Life Insurance Company, 17 F. (2d) 370* (in which certiorari was denied by this court, 274 U. S. 750; 71 L. ed. 1331) where the policy in question contained a provision that "*participation* in * * * aeronautic * * * activity, either as a passenger or otherwise" limited the recovery to the cash premiums paid, and the insured there was struck and killed by the propeller blade of the airplane as he was walking away from the machine *after* having completed a flight with his partner as operator. There was no showing there that Pittman had taken any part in the operation of the airplane; to the contrary, it affirmatively appears from the opinion that Bailey, the partner, had operated the airplane and that Pittman had only been a passenger therein. Circuit Judge Walker pointed out:

> "The language used requires the conclusion that, though the trip or aeronautic expedition in which the insured had been taking part ended prior to

his death, the insurer's liability was limited to the cash premium paid, if the insured's death occurred *while he was participating* in an aeronautic activity. The term 'aeronautic activity' is broad enough to cover what is ordinarily incident to an airplane trip. The aeronautic activities of one who takes such a trip do not begin or end with the actual flight, but include his presence or movements in or near to the machine incidental to beginning or concluding the trip. The quoted provision shows that the *insurer did not consent to insure against the hazards incidental to an airplane trip.* The insured incurred those hazards, and his death resulted from his remaining exposed to one of them. *We are of the opinion that his presence at the place where he was killed was so immediately connected with and incidental to the airplane trip he took as to require the conclusion that his death occurred while he was participating in an aeronautic activity.*"

If the foregoing opinion contains a correct interpretation of the word "participate"—and we may fairly assume even the lower court will not say it does not, because it cited it approvingly in the *Head Case, supra,* in support of the proposition there announced by the lower court "that a passenger in an airplane, flying in the air *was participating in aeronautics*"—then it must necessarily follow, as held in that case and in the Head Case, that in order to *participate* in a forbidden activity, such as riding in an airplane or on a truck load of dynamite caps, it is not essential to a finding as a matter of law that such participation was a risk not assumed under, but is expressly excepted from, the policy, to show the insured was directing the operation of the machine or making suggestions as to its speed or management. As stated by Judge Walker in the *Pittman Case (17 F. (2d) 371), supra,* "the quoted provision shows that the insured did not consent to insure against the hazards incidental to an airplane trip. *The insured incurred those hazards, and his death resulted from his remaining exposed to one of them,*" just as Prinsen incurred the hazard incident to an explosion of dynamite when he was engaged in delivering the dynamite caps at the powder magazine and continued to remain exposed to that hazard when he boarded the truck loaded with the dynamite caps to ride back to town.

In the *Bew Case (112 Atl. 859) supra,* the provision in the policy exempted liability for fatal injuries sustained "while participating in or in consequence of having participated in aeronautics". Bew entered an exhibition airplane as a passenger, took no part in its operation, and was merely seated "beside the pilot" when the plane went into a "nose dive" and he was killed when it fell to the earth. The attorney for the assured there argued, as the majority opinion in this case apparently holds, that to "participate" one must exercise some management or control over the instrumentality; but the court in that case thus answered that argument:

> "Plaintiff insists that *one participates only* when he is *physically active* in the management and control of an instrument or agency, . . .
>
> "There is nothing in the definition given, or in the common use of the term, to confine it to those who are active in the piloting of air vessels and to exclude those *who are inactive users thereof.* If it had been intended to confine the application of this provision to those who pilot or manage the physical operations of such vessels, it would probably have been expressed by using some such language as '*engaging* in the piloting, management, or operation of aeronautical vessels'."

In the *Peake Case (89 So. 418), supra,* the court squarely holds that it is not necessary for one to take active part in the operation or management of the vehicle or instrumentality in order to be held in law to have participated in its movement, saying:

> "A passenger in an airplane flying in the air, *whether he takes part in the operation of the airplane or not, is 'participating* in aeronautics' within the intent and meaning of the provision specifically excepting such a risk from the indemnity contract contained in the policy."

In the *Meredith Case, (252 S. W. 976) supra,* where the policy did not cover death occurring while "participating" in aeronautics, and the petition alleged that deceased was killed while "riding, as a passenger for hire, in a" plane, the

court holds squarely against the construction or interpretation placed by the majority opinion in this case upon the word "participate", saying:

> *"There is no implied meaning of contributing effort, nor that one participating is the creator or cause of that in which he participates."*

We believe we have herein referred to every case involving the legal construction or interpretation of clauses excluding liability for accidents occurring while *participating* in a forbidden hazardous venture. In no decided case we have been able to find has it been held by any court that the "participation contracted against" is only that which, as the majority opinion here holds, contemplates "action, effort, or direction".

Each and every one of the cases above quoted from, including the former decision of the Tenth Circuit Court of Appeals in the *Head Case (43 F. (2d) 517) supra,* expressly and explicitly repudiates the idea that in order to have participated in the movement or transportation of the dynamite caps it was required that Prinsen should have taken some active part in the driving or operation or control of the automobile truck which was loaded with the dynamite caps. Only one of them could drive the truck; but surely both could have been, and were, participating in the movement or transportation of the dynamite caps. If this is not true in this case then no two persons could participate in the transportation of a truck load of dynamite where only one can drive the truck. If this is not true in this case then every case cited in this brief, including the *Head Case* by the same court, was erroneously decided, for in none of them was the insured doing more than sitting in the conveyance and taking no part in its actual operation and contributing no "action, effort or direction toward its movement".

When we look to the record in this case to see the extent to which Prinsen actually participated in the movement and transportation of the dynamite caps in question we find that his participation consisted of considerably more than merely riding on the truck at the time it was hit by the train. He had "received and written up" at the office of his employer the order for the 300,000 dynamite caps in question (R. 31). He had been notified that Begaman, the truck driver of the customer who had ordered the dynamite caps, would come to

Salt Lake for them within the next day or so" (R. 31). Within the time specified Begaman appeared at the office of the Powder Company and Prinsen drove out with him on the truck in question to the magazine where the powder was stored, north of Salt Lake City just over the line in Davis County (R. 31).

Will this court say that it is a disputed question of fact for a jury to decide whether Prinsen on the occasion in question had been and was exposing himself to hazards incidental to the movement and transportation of dynamite caps when the record shows it was admitted and stipulated by the parties at the trial that

> "Mr. Prinsen took the key to this magazine and went over with Mr. Begaman on his truck and effected delivery of the powder and was returning on the truck when the accident happened." (R. 32)

What more is it necessary for your petitioner to show to enable this court to say as matter of law that on the occasion in question Prinsen had participated, and at the time of his death was participating, in the movement and transportation of the truck load of dynamite caps in question? If, as Judge Phillips holds in the *Head Case, (43 F. (2d) 517), supra,* "the word 'participate' means simply 'to take or have a part or share in'," surely Prinsen on the occasion in question was participating in the movement and transportation of dynamite, and was sharing with the driver in the risk incident to its movement, and was just as much exposed to that risk as though he had been driving, and his death occurred while he was so engaged so as to preclude his heirs from recovering in view of the exception in the by-laws of this petitioning Association.

We respectfully submit that the writer of the majority opinion overlooked the legal distinction as announced and settled by all the courts, including that court previously, between a provision in a policy which exempts liability where a person is "engaged in" a forbidden activity and those cases which construe a provision excluding accidents occurring while the insured is "participating in" a forbidden venture which exposes him to risk of injury.

In arriving at the meaning of the word "participate" as used in the policy in suit this court will endeavor to place

itself in the position of the contracting parties so as to appreciate the risks which the insurer intended to assume and those which it intended to exclude. Dynamite is well known to be an explosive and when it explodes persons in too close proximity are killed or injured. Plainly Prinsen was participating in the movement of dynamite while making delivery at the magazine. If the explosion had occurred there he would have been killed if close enough to the explosion, and his death would have resulted from physical proximity to the dynamite and not from any legal relation to it. When the train exploded the dynamite Prinsen and Begaman were both subject to the same identical hazard. The fact that Begaman was driving the truck did not increase his danger one whit over the danger to which Prinsen was exposed. Both were equally exposed to a risk which the insurer plainly intended to exclude from its coverage.

Placing itself in the position of the parties at the inception of the agreement, will this court permit it to be said that with two members sitting in the seat of a truck loaded with dynamite the clause here found in the association's benefit certificate could be so construed by the courts as not to bind one member because he was not driving and yet cover the other because he happened to be driving?

It is therefore respectfully submitted that this case is one which properly calls for the exercise of this court's supervising powers to grant a writ of certiorari to the end that after reviewing the decision of the Tenth Circuit Court of Appeals in this case and comparing and considering its conflict with other decisions of both federal and state courts involving and construing the same contract provision so frequently found in accident insurance policies and fraternal benefit association certificates, this court may determine and settle the true and correct construction to be placed thereon to be followed in this and future cases.

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